UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD WASHINGTON, D.C.

LONG MECHANICAL, INC.

Respondent

and Cases 7-CA-52917 7-CA-53146

LOCALS 98 AND 636, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO

Charging Parties

RESPONSE OF CHARGING PARTIES IN OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION OF THE BOARD'S DECISION AND ORDER IN LONG MECHANICAL, INC., 358 NLRB NO. 98 (Aug. 9, 2012)

7-CA-53200

Charging Parties Locals 98 and 636, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, by their attorney Tinamarie Pappas, oppose Respondent Long Mechanical, Inc.'s August 31, 2012, Motion for Reconsideration of the Board's Decision and Order in *Long Mechanical, Inc.*, 358 NLRB No. 98 (Aug. 9, 2012), and in support thereof state as follows:¹

Respondent has requested reconsideration of the Board's Decision and Order granting default judgment against it for violation of one or more terms of the informal settlement agreement in these matters.² Rule 102.48(d)(1) of the Board's Rules and Regulations, as amended, provides:

¹Although Respondent's Motion for Reconsideration was apparently filed with the Board on August 31, 2012, Counsel for the Charging Parties was not served a copy of the Motion until September 5, 2012.

² As noted by the Board in its Decision and Order, the informal settlement agreement contained a specific provision authorizing both the reissuance of the complaint and the filing of a motion for default judgment in the event of

A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on.

For all of the reasons stated by Counsel for the Acting General Counsel in their September 14, 2012 response in Opposition to Respondent's Motion for Reconsideration, which are incorporated by reference herein, Respondent has failed to demonstrate any "extraordinary circumstances" which would warrant reconsideration of the Board's Decision and Order in these matters.

In addition, while Respondent summarily asserts that the Board, in granting the General Counsel's Motion for Default Judgment, committed material error by failing to consider "evidence" of "specific denials in the record", Respondent fails to demonstrate a single piece of evidence, a specific denial, or any other specific response to General Counsel's Motion which was actually presented to the *Board*, either in response to General Counsel's Motion for Default Judgment, or to the Board's Order to Show Cause. Indeed, there was no such evidence or specific denials presented to the Board. In a transparent and wholly unpersuasive attempt to extract itself from this glaring reality, Respondent instead relies upon alleged evidence presented to the *Regional Director* during the investigation conducted to determine whether Respondent had, in fact, breached one or more terms of the informal settlement agreement in these matters. Respondent then gratuitously refers to the evidence it allegedly presented to the Region as constituting "the record" before the Board, despite the undisputed fact that such evidence was never presented to the Board.

Respondent's non-compliance with the terms of the settlement. The settlement agreement further provided that upon filing of such motion for default judgment, "the Board shall issue an order requiring the Charged Party to show cause why said motion. . .should not be granted." The General Counsel's Motion for Default Judgment was filed on October 10, 2012, and the Board's Show Cause Order issued on December 20, 2011.

Under these circumstances, it is impossible to fathom what "extraordinary circumstances" could be conceived by Respondent to exist in support of reconsideration by the Board, since it was Respondent's own failure to present a single specific denial or piece of contrary evidence that formed the basis for the Board's grant of default judgment. Even more astonishing, is the fact that Respondent filed *three* separate responses to the GC's Motion for Default Judgment, and failed in any of them to present either a shred of this alleged "evidence", or a single specific denial to the Board in opposition to the General Counsel's motion for entry of default judgment.

More specifically, in its initial October 28, 2011 response to General Counsel's Motion for Default Judgment, the only statement presented to the Board by Respondent was the following:

Despite entering into the settlement agreement, Respondent denies each of the allegations made in the Reissued Consolidated Amended Complaint, which were never litigated or addressed by an Administrative Law Judge or the Board. Of more significance, however, is the fact that Respondent has not, in anyway, breached this settlement agreement.

Subsequently, Respondent filed a December 2, 2011 Reply to the General Counsel's Response to Respondent's initial statement in Opposition. In its Reply, the only argument raised by Respondent to the General Counsel's Motion was an assertion that the "underlying facts which the Acting General Counsel alleges form the basis for its Motion for Default Judgment are the same disputed facts which led to the execution of the October 14, 2011 Settlement Agreement in Cases 07-CA-053473, 07-CA-053572, and 07-CA-060379."

The "settlement agreement" referred to by Respondent was a formal settlement stipulation in the three consolidated cases referred to above. These were completely different cases from those involved in the instant litigation and were not subject of the General Counsel's

Motion for Default Judgment. It appears that Respondent had erroneously concluded that the General Counsel was basing its Motion for Default Judgment on the admissions contained in the formal settlement stipulation, even though the General Counsel's Motion was devoid of a single reference to the formal settlement stipulation in those unrelated cases. In any event, Respondent offered neither a single substantive denial nor a single shred of evidence to dispute the claim underlying General Counsel's Motion, which was that Respondent was in non-compliance with the informal settlement agreement in the instant matters.

Respondent's third and final "response" to the Motion for Default Judgment was its December 28, 2011 Response to the Board's Order and Notice to Show Cause. Other than to incorporate by reference its two earlier responses, the only "new" argument proffered by Respondent was a claim that the Board would prospectively lack "constitutional authority" to rule on the Motion for Default Judgment in light of the U.S. Supreme Court's decision in *New Process Steel L.P. v. NLRB*, 560 U.S.______, 130 S. Ct. 2635, 177 L. Ed. 2d 162 (2010), because it did not have a duly constituted "quorum" of three members. This purely legal argument proved ultimately to be wholly without merit, since at the time of the Board's August 13, 2012 decision it had a sufficient quorum of Board members to fully satisfy the Supreme Court's mandates under *New Process Steel*.

Counsel for the General Counsel has set forth in detail why Respondent's evidentiary submissions and arguments made only to the *Region*, even if they were subject to proper consideration by the Board, which they are not, fail to warrant reconsideration by the Board. Just by way of example, and as demonstrated by General Counsel, it is undisputed that employees Michael Baran, Thomas Simcheck, and Thomas Stark have never been recalled to employment by Respondent, despite the informal settlement agreement's provision requiring

Respondent to preferentially recall such individuals.³ A fourth employee, Tony Ratcliffe, was not recalled until June 6, 2011. It is further undisputed, that following the date on which Respondent signed the settlement agreement, it recalled several other employees from layoff, rather than the four above-named employees to whom it owed the right of preferential recall.⁴ The other examples of non-compliance with the terms of the settlement have been fully briefed by the General Counsel, and are incorporated by reference herein.

The single case cited by Respondent, *Vocell Bus Company, Inc.*, 357 NLRB No. 148 (2011) is wholly distinguishable from the instant case because there, the pro se respondent, in answer to the Board' Order to Show Cause, not only denied that it had breached the settlement agreement, but offered specific facts to dispute of the General Counsel's claims. As a result, the Board found the existence of a factual dispute warranting a hearing. Here, there is no factual dispute for the simple reason that Respondent offered no *facts* whatsoever to dispute the General Counsel's claims of a breach of the settlement.

Respondent now belatedly cites to documents attached to <u>General Counsel's</u> Motion for Default Judgment as "evidence" that it did not breach the settlement agreement. As noted by General Counsel however, not only did Respondent fail to either cite, or even refer, to such documents in any of its three responses to the Board, it also failed to ever argue, explain, or even make the bare assertion to the Board that such documents established its compliance with the terms of the settlement. Clearly, this asserted evidence was neither unknown to Respondent nor

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³ The preferential recall language is not conditioned on skill set, extent of available work, or any other criteria, nor does it provide for any discretion by Respondent recall among laid off employees. Rather, it clearly and unequivocally provides that these employees shall be preferentially recalled.

⁴ Among the employees recalled to employment in lieu of Baran, Simcheck and Stark, were Doug Jarvis, Gabe Ivan, Rob Rice, Gary Steiner, Andy Hocking and Bryan Hensley. Moreover, Respondent has adamantly maintained since prior to the RC election in 2009, that all of its employees are "multi-skilled" and able to perform all manner of work, be it sheet metal or plumbing/pipefitting. Accordingly, if there was work sufficient to recall Jarvis, Ivan, Rice, Steiner, Hocking, and Hensley, as Respondent admits, then there was sufficient work to preferentially recall the individuals to whom such preferential right was owed under the settlement agreement.

newly discovered. *Fitel/Lucent Technologies*, *Inc.*, 326 NLRB 46 (1998); *Superior Protection*, *Inc.*, 341 NLRB 614 (2004); *Hanes Dye and Finishing Co.*, 255 NLRB 1128 (1981). As a result, Respondent has waived the right to assert such arguments or evidence as a basis for reconsideration.⁵

Accordingly, Respondent has failed to establish the existence of any extraordinary circumstances justifying reconsideration of the Board's Decision and Order, and, Respondent's Motion should, therefore, be denied.

Respectfully submitted this 18th day of September, 2012.

s/Tinamarie Pappas

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⁵ As General Counsel competently argues, even assuming, *arguendo*, that this evidence had been raised by Respondent to the Board, there has still been no showing of the existence of a material factual dispute warranting a hearing.

CERTIFICATE OF SERVICE

I, TINAMARIE PAPPAS certify that on September 18, 2012, I electronically filed Response of Charging Parties In Opposition to Respondent's Motion for Reconsideration, using the NLRB's electronic filing system, and on the same date served counsel for the Employer via email to rfinkel@fwslaw.com and mweissman@fwslaw.com, and counsel for the General Counsel via email to patricia.fedewa@nlrb.gov and jennifer.brazeal@nlrb.gov. The above statements are true and correct to the best of my knowledge, information and belief.

s/Tinamarie Pappas

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